

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Telephone Number Portability
Cost Classification Proceeding

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CC Docket No. 95-116
RM 8535

APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115(a), Cincinnati Bell Telephone Company ("CBT") hereby requests the Commission to review and vacate the December 14, 1998 Memorandum Opinion and Order of the Common Carrier Bureau, DA 98-2534 ("Bureau Order"). CBT previously participated in this proceeding, both by filing comments with the Commission in the general docket and by filing reply comments on September 16, 1998 in response to the Commission's May 12, 1998 Third Report and Order in this proceeding. Furthermore, CBT is aggrieved by the action taken by the Common Carrier Bureau because CBT is an incumbent LEC who may not be permitted to recover large portions of its costs of implementing local number portability ("LNP") under the policies established therein. Thus, CBT has standing, both as a participant in this proceeding and as an aggrieved party, to seek review of the Bureau Order.

The Bureau Order unlawfully prevents incumbent LECs from recovering certain network upgrade costs through LNP charges even when the costs would not have been incurred by the incumbent LECs but for the regulatory mandate to implement LNP. The Bureau's Order departs from the policies established by the Commission in the Third Report and Order and is unlawful. This Application for Review presents the following questions for review:

1. Whether the Bureau acted improperly and without authority when it barred incumbent LECs from recovering certain network upgrade costs caused by LNP implementation

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through LNP charges, in contradiction to the Commission's ruling that all incremental costs of implementing LNP are recoverable.

2. Whether the Bureau's requirement that incumbent LECs recover network upgrade costs caused by LNP implementation through charges for other services as a "cost of doing business" fails to provide LECs with an adequate means of cost recovery, violates the statutory requirement that cost recovery for LNP be "competitively neutral," and constitutes an unauthorized taking of LEC property.

This matter warrants the Commission's consideration pursuant to 47 C.F.R. § 1.115(b)(2)(i) because the action was taken pursuant to delegated authority and is in conflict with the governing statute and established Commission policy.

CBT asks the Commission to vacate the Bureau Order with respect to the recovery of costs related to providing LNP and declare that incumbent LECs may recover all incremental costs of network upgrades that are caused by compliance with the LNP mandate. The Commission ought to issue new cost recovery rules itself, allowing for full recovery of such costs by incumbent LECs, without further proceedings by the Common Carrier Bureau.

BACKGROUND

In the Third Report and Order, the Commission determined that the costs of implementing LNP should be divided into three categories: 1) shared costs; 2) carrier-specific costs directly related to providing number portability; and 3) carrier-specific costs not directly related to providing number portability.¹ This Application for Review relates to the Common Carrier Bureau's treatment of the second and third categories. In the Third Report and Order, the

¹ Third Report and Order, ¶ 68.

Commission determined that LECs should be allowed to recover the incremental costs of network upgrades related to providing LNP. Specifically, the Commission stated:

We will also consider as carrier-specific costs directly related to the provision of number portability that portion of a carrier's joint costs that is demonstrably an incremental cost carriers incur in the provision of long-term number portability. Apportioning costs in this way will further the goals of section 251(e)(2) by recognizing that providing number portability will cause some carriers, including small and rural LECs, to incur costs that they would not ordinarily have incurred in providing telecommunications service. At the same time, this approach recognizes that some upgrades will enhance carriers' services generally, and that at least some portion of such upgrade costs are not directly related to providing number portability.²

Rather than establish detailed rules stating how particular carrier-specific costs were to be recovered, the Commission delegated that task to the Common Carrier Bureau in the following manner:

To facilitate determination of the portion of joint costs carriers shall treat as carrier-specific costs directly related to providing number portability, and to facilitate evaluation of the cost support that carriers will file in their federal tariffs, we are requesting that carriers and interested parties file comments by August 3, 1998 proposing ways to apportion the different types of joint costs. Carriers and interested parties may file reply comments by September 16, 1998. We will delegate to the Chief, Common Carrier Bureau, to determine appropriate methods for apportioning joint costs among portability and nonportability services, and to issue any orders to provide guidance to carriers before they file their tariffs, which are to take effect no earlier than February 1, 1999.³

CBT participated in the Common Carrier Bureau proceeding by filing reply comments on September 16, 1998. In its reply comments, CBT specifically addressed a number of network upgrade costs that it had incurred in order to comply with the LNP mandate. These included SS7 system augmentation costs necessary to accommodate the increased signaling traffic associated with LNP and various OSS upgrades necessary to allow CBT's OSS systems to operate in an LNP environment. Existing pre-ordering, ordering, provisioning, billing, maintenance and repair

² Third Report and Order, ¶ 73.

³ Third Report and Order, ¶ 75.

and 911 systems were designed to operate in an environment where an NXX code designated a particular switch location and would not function properly in an LNP environment without substantial changes. These OSS upgrades were directly caused by implementation of LNP and were necessary to avoid "impairment of quality, reliability or convenience when switching from one telecommunications carrier to another" as mandated by 47 U.S.C. § 153(30).

In the Bureau Order, the Bureau established methodologies for measuring "eligible" LNP costs at odds with the policy established by the Commission. With respect to costs necessary to provide LNP functionality, the Bureau imposed the following standard: "We interpret the Commission's language regarding incremental costs as requiring that incumbent LECs subtract the cost of an item without the telephone number portability functionality from the total costs of that item with the telephone number portability functionality. Only the difference, the incremental cost incurred *for the provision of portability*, is an eligible long-term portability cost."⁴ Regardless of whether a cost would not have been incurred but for the requirement to comply with LNP, the Bureau's policy would only allow recovery as LNP costs the difference between the cost of an item with LNP functionality and the same item without such functionality.⁵ This contradicts the Commission's ruling that these costs should be recoverable, except to the degree the upgrade enhanced other services.

I. THE BUREAU UNLAWFULLY EXERCISED ITS DELEGATED AUTHORITY AND DECIDED A SUBSTANTIVE POLICY CHANGE BY ADOPTING COST RECOVERY RULES THAT DIRECTLY CONFLICT WITH THE COMMISSION'S INSTRUCTIONS.

The Common Carrier Bureau was delegated authority pursuant to the Third Report and Order to carry out a specific task of devising methodologies for determining the portion of costs

⁴ Bureau Order, ¶ 23.

that should be charged to LNP services in accordance with the Commission's policies. The Bureau was not authorized to establish new policies and certainly was not given authority to override or change policies that had been established by the Commission. However, that is exactly what the Bureau has done in the Bureau Order. Such action beyond the scope of the delegated authority must not be allowed to stand or else the agency commits an abuse of discretion. Gulf South Pipeline Co. v. FERC, 876 F.2d 431, 433 (5th Cir. 1989). Bureau action that changes or goes beyond the Commission's policies itself would constitute substantive rulemaking that must comply with the requirements of the Administrative Procedure Act. 5 U.S.C. § 553.

While the Commission's Third Report and Order established a policy that LECs should recover "costs that they would not ordinarily have incurred in providing telecommunications service,"⁶ the Bureau imposed a two-part standard that required both "but for" causation between implementation of LNP and incurring the cost and that the costs were incurred "for the provision of" number portability service.⁷ The second prong of this test eliminates from consideration for LNP cost recovery costs incurred by LECs that are not directly necessary to provide LNP service itself, despite the fact that these costs must be incurred to allow other LEC systems to work properly after LNP service is put into place. For example, it is not necessary in order for LNP service itself to work for the nation's 911 systems to be upgraded. However, once LNP is in place, the 911 systems will not work properly unless they are upgraded to accommodate LNP. Thus, these upgrade costs meet the first prong of the Bureau's test, i.e. they would not be incurred but for the need to implement LNP, but they were not incurred for the direct provision

⁵ Bureau Order, ¶¶ 24, 27.

⁶ Third Report and Order, ¶ 73.

⁷ Bureau Order, ¶ 10.

of LNP itself. This decision by the Bureau has the effect of denying LECs recovery of the bulk of many upgrades (e.g., OSS upgrades) that were directly caused by LNP implementation.

The Telecommunications Act of 1996 required that number portability be implemented in a manner that would not impair quality, reliability or convenience.⁸ The Commission determined that costs of number portability "are the costs of enabling telecommunications users to keep their telephone numbers without degradation of service when they switch carriers."⁹ Contrary to the policy established by the Commission, the Bureau Order determined that costs incurred to avoid degradation of service due to number portability were not "for the provision of portability" and could not be recovered as such.¹⁰ The Bureau erred in this determination, which is contrary to established Commission policy and the express terms of the Act.

While the Commission's policies would allow recovery of costs such as software generics, switch hardware, OSS, SS7 and AIN upgrades, less some offset for incidental benefits derived by other services, the Bureau's actions would exclude many of these costs, particularly the costs associated with virtually all OSS upgrades that were required in order to maintain network functionality in an LNP environment. The Bureau made no effort to determine the incidental benefits that network upgrades would provide to other services, but focused solely on whether the upgrade would cost more with LNP features than without LNP features. This reversal in policy is clearly beyond the scope of the authority the Commission delegated to the Bureau in the Third Report and Order. The Commission must enforce the limits on the authority that it delegated and vacate the Bureau's unauthorized action.

⁸ 47 U.S.C. § 153(30).

⁹ Third Report and Order, ¶ 36.

¹⁰ Bureau Order, ¶ 13.

II. THE BUREAU'S ACTION IS FURTHER UNLAWFUL BECAUSE IT FORCES LECs TO RECOVER THE COSTS OF LNP FROM OTHER SERVICES OR TO ABSORB THE COSTS AS A "COST OF DOING BUSINESS."

The Bureau's actions violate the Commission's decision that all network upgrade costs demonstrably incremental to provision of LNP should be recoverable and that all costs of LNP are to be recovered through federal rate mechanisms. As the only federal mechanisms available to LECs are interstate access charges and end user charges, and recovery of LNP costs through access charges was expressly prohibited by the Commission, LECs must be allowed to recover all LNP costs through end user charges. Rather, the Bureau's decision would leave these costs either unrecovered, or only recovered through state rates. Both results are unlawful.

The Bureau directed LECs to recover LNP costs it did not deem eligible for LNP cost recovery from traditional price caps or rate-of-return cost recovery,¹¹ which in the federal jurisdiction could only mean that they would be recovered through access charges. However, the Commission specifically determined that LNP costs were not access related and expressly forbade their recovery in access charges.¹² The Bureau further suggested that these costs were to be treated as general network upgrades and should be absorbed as a cost of doing business. However, that conclusion violates several other cost recovery restrictions: 1) to the extent that incumbent LECs incur network upgrade costs with no means of recovering those costs, the ILEC will be competitively disadvantaged and the cost recovery would not be competitively neutral as required by § 251(e)(2) of the Telecommunications Act of 1996; 2) to the extent the Bureau expects incumbent LECs to recover these costs in their intrastate rate bases, it violates the proscription against federal involvement in state ratemaking (see Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986); Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir

¹¹ Bureau Order, ¶ 24.

1997), cort. granted sub nom. AT&T v. Iowa Utilities Board, 118 S.Ct. 879 (1998)); and 3) to the extent LECs are expected to go without any means of cost recovery, it violates the Fifth Amendment proscription against taking of property without adequate compensation (see Duquesne Light Co. v. Barasch, 48 U.S. 299 (1989)). In any event, Congress did not authorize the Commission (and certainly not the Bureau) to take LEC property in § 251(e)(2). See Bell Atlantic Tel. Co. v. FCC, 24 F.2d 1441 (D.C. Cir. 1994).

CONCLUSION

For the foregoing reasons, the Commission should vacate the action of the Common Carrier Bureau with respect to establishing policies for the recovery of joint costs of providing LNP. Such costs must be allowed to be recovered through LNP cost recovery mechanisms if the costs meet the "but for" causation test. If such costs have additional benefits to LECs, the Commission could require the deduction of those benefits from the recoverable cost. However, the Bureau's "incremental cost" test would preclude nearly all such costs from being properly recovered. The Commission must exercise control over the powers it delegated to the Bureau and grant this Application for Review.

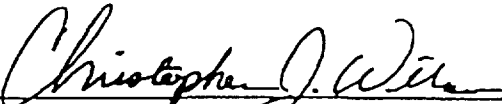
CBT further requests the Commission to expedite consideration of this Application for Review. While the Application is pending, CBT and other LECs will be prevented from recovering their appropriate LNP costs. As the Commission has limited the time period in which certain LNP costs may be recovered, any delay in deciding this matter will cause LNP rates for the balance of the recovery period to increase. Such an increase would be detrimental to competitive neutrality and disadvantage LECs. Therefore, it is in the public interest for the

¹² Third Report and Order, ¶ 135.

Commission to expedite its ruling and permit LECs to recover their full LNP costs as soon as possible.

Respectfully submitted,

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